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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 680 - 681 - 682

IN THE MATTER

of

CROSBY STORES, INC.,

Bankrupt.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

MERRITT LANE,
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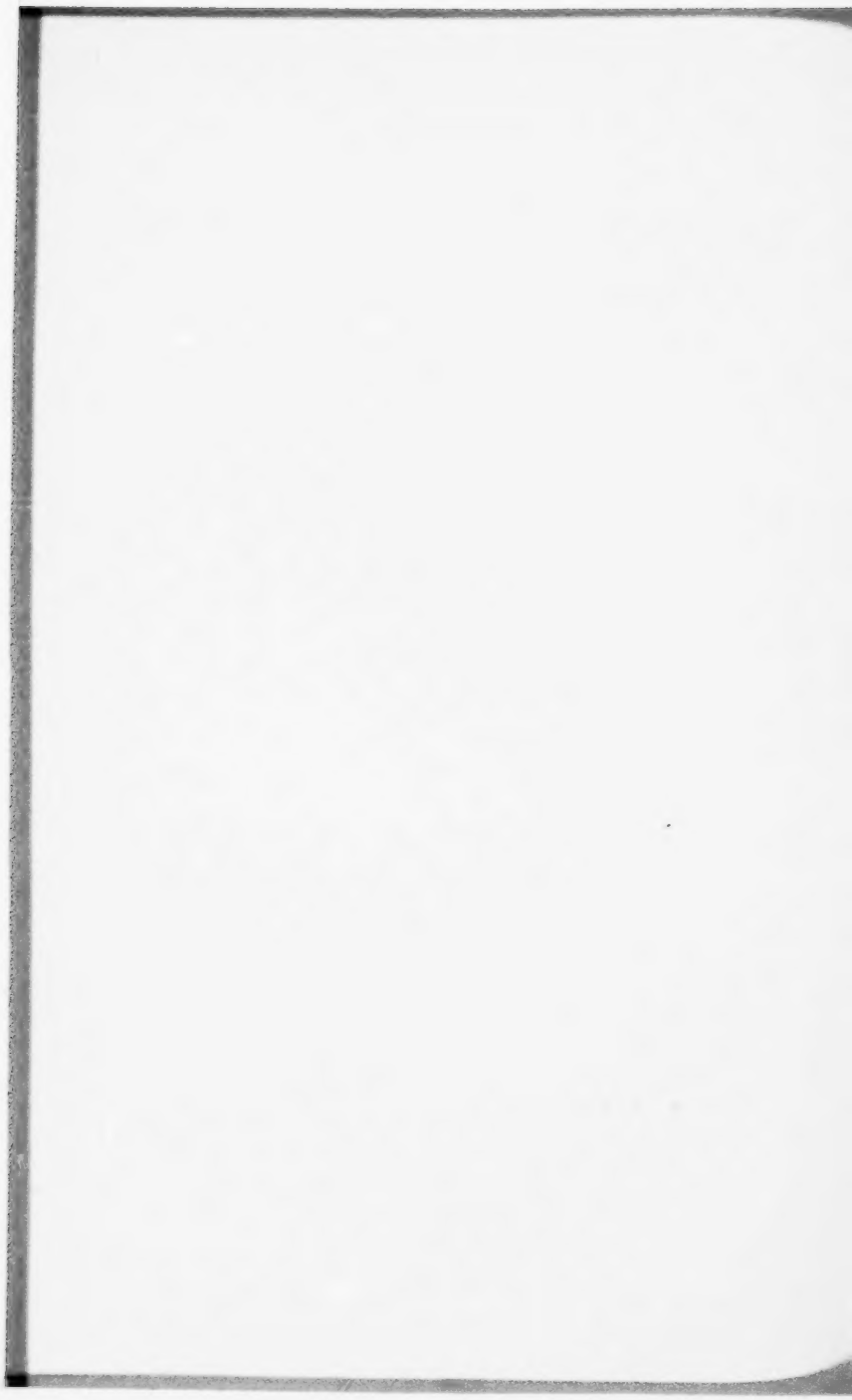

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IN THE

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No. .....

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of

CROSBY STORES, INC.,

Bankrupt.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, J. S. S. Weisman and John Milton, individually and as receivers of Crosby Stores, Inc., Isaac Gross and Joel Gross, partners as Gross & Gross, who were solicitors of complainant in the proceedings in the Court of Chancery of New Jersey, and Isaac Gross and Joel Gross, partners as Gross & Gross, and William Harris, who were solicitors of J. S. S. Weisman and John Milton, receivers of Crosby Stores, Inc., appointed by the Court of Chancery of New Jersey humbly showeth:

1. On September 3, 1931, a bill was filed in the Court of Chancery of New Jersey against Crosby Stores, Inc., a New Jersey corporation, praying for an injunction against defendant corporation and the appointment of receivers pursuant to the Corporation Act of New Jersey, section 65, 2 C. S. of N. J., p. 1640, as amended P. L. 1931, chapter 221, p. 545, sec. 66, 2 C. S. of N. J., p. 1643; on October 13, 1931, the court granted the statutory injunction and appointed your petitioners J. S. S. Weisman and John Milton as receivers, as a result of which title to all of the corporation's property passed by virtue of the statute to the receivers, sec. 68, 2 C. S. of N. J., p. 1644; *Nottebaum* v. *Leckie*, 31 Fed. (2d) 556 (C. C. A. 3rd); on October 14, 1931, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against Crosby Stores, Inc., and the Irving Trust Company was appointed receiver in bankruptcy; no ancillary proceedings were instituted in New Jersey; Crosby Stores, Inc., was adjudged a bankrupt by the United States District Court for the Southern District of New York on October 30, 1931; on December 1, 1931, Irving Trust Company was made trustee in bankruptcy; immediately upon the appointment of the receivers in Chancery, they entered into possession of the corporation's property and, under orders of the Court of Chancery, continued the business, which was that of operating department stores, one located in Jersey City and the other in Perth Amboy, New Jersey (Schedule "G," annexed to the trustee's petition, p. 29); in the conduct of the business the receivers purchased and sold merchandise, incurring obligations, paying in part therefor, and, at the time of the appointment of the trustee in bankruptcy, they had in hand $15,628, moneys to the

credit of the Jersey City store, and $3,161.77 to the credit of the Perth Amboy store, and were indebted to receivers' creditors for merchandise purchased in the conduct of the Jersey City store in the sum of $8,832.83 and for consigned merchandise sold at such store $2,382.12, and for operating expenses $683.62, and they were likewise indebted for merchandise purchased by them in the conduct and operation of the Perth Amboy store in the sum of $3,092.58, and for consigned merchandise sold at said store $594.40, and for operating expenses $512.85 (Schedule "H," annexed to the trustee's petition, p. 36; Schedule "G," annexed to the trustee's petition, p. 29).

2. It is impossible to allocate the moneys in the hands of the receivers at the time they ceased to operate the business on December 17, 1931, between proceeds of the liquidation of inventory of which they took possession at the time they were appointed and proceeds of the sale of merchandise purchased by them during the time the business was conducted by them. From the date of the appointment of Irving Trust Company, as receiver in bankruptcy on October 14, 1931, until December 11, 1931, the receiver in bankruptcy and the trustee in bankruptcy acquiesced in the conduct of the business located in New Jersey by the receivers in Chancery. On December 11, 1931, the trustee in bankruptcy presented its petition to the referee in bankruptcy in New York, which resulted in an order to show cause made by the referee on the same date which, in turn, resulted in the making of the order of December 14, 1931, by the Referee, the receivers in Chancery not appearing on the return of the order to show cause, directing the receivers in Chancery to turn over to the Irving Trust Com-

pany all of the property under their control as receivers in Chancery and directing them to file their account with the referee (Schedule "B," annexed to the petition, p. 12). This order of the referee in bankruptcy was designed to make effective a sale which the trustee in bankruptcy had made on December 1, 1931, of all of the assets of the bankrupt (pars. 5, 6, 7, petition of trustee, p. 2).

3. On December 9, 1931, the receivers in Chancery filed their report and account with the Court of Chancery (Schedule "G," annexed to the petition of the trustee, p. 29), which resulted in an order made on that day directed to all the creditors and stockholders and the trustee in bankruptcy requiring them to show cause why the account and report of the receivers should not be approved and proper compensation made (Schedule "C," annexed to the petition of the trustee, p. 14); the trustee, instead of appearing in the Court of Chancery, met the application by the order of the Referee of December 14, 1931 (Schedule "B," annexed to the petition of the trustee, p. 12); on December 14, 1931, the Court of Chancery, disregarding the order of the Referee, made an order approving the receivers' accounts and directing the payment to the receivers of $6,000 for services, to the solicitors of the receivers, $4,000 for services besides costs, and to the solicitors of the complainant $350, besides costs (Schedule "D," annexed to the petition of the trustee, p. 16); the trustee in bankruptcy did not appear upon the hearing in the Court of Chancery; instead it instituted its first proceeding of an ancillary nature in the United States District Court for the District of New Jersey by filing a petition on December 16, 1931 (Schedule "F-1," annexed to the petition of the trustee, p. 21),

which resulted in the order of the United States District Court of the same date directed to the receivers and their solicitors and the solicitors of the complainant in Chancery to show cause before the United States District Court why they should not be directed to turn the assets over to the trustee in bankruptcy and to file their accounts and make application for allowances to the referee in New York; the receivers in Chancery disregarded this order to show cause, and on December 22, 1931, the United States District Court (Schedule "F," p. 26), made an order directing the receivers in Chancery to turn over and deliver to the trustee all of the assets under their control "excepting such moneys as they shall have necessarily expended in and about the preservation of the assets and property of said bankrupt prior to the date of the filing of the involuntary petition in bankruptcy against said bankrupt" (one day) and also restraining them from "in any manner disposing of any and all moneys heretofore received by them and/or any of them pursuant to an order made by said Court of Chancery bearing date the 14th day of December, 1931, wherein they were awarded compensation for services alleged to have been rendered by them or any of them referred to in said order"; the receivers in Chancery after liquidating all their indebtedness, turned over the balance in their hands to the trustee in bankruptcy, but refused to turn over the moneys which they had received for compensation under the orders of the Court of Chancery, instead of doing which they filed a further account with the Court of Chancery (Schedule "H," annexed to the petition of the trustee, p. 36), which resulted in an opinion of Vice Chancellor Fallon, 109 N. J. Eq. 450, and in the filing of the petition of the trustee on July 1, 1932 (p. 1), which resulted in an order

(p. 44), directing your petitioners, J. S. S. Weisman and John Milton, individually and as receivers, to turn over to the bankrupt estate the moneys which they had paid to themselves for compensation under the orders of the Court of Chancery and directing your petitioners Gross & Gross and William Harris to turn over to the trustees in bankruptcy the sum of $4,000 besides their taxed costs which was the sum paid to them as solicitors of the receivers by order of the Court of Chancery, and directing your petitioners Gross & Gross to turn over to the trustee in bankruptcy the further sum of $350 paid to them as solicitors of the complainant in the proceedings pending in the Court of Chancery of New Jersey which resulted in the appointment of receivers in Chancery.

4. The opinion of the District Court is found on page 43 of the record. An appeal was taken by your petitioners to the Circuit Court of Appeals for the Third Circuit, which, on November 17, 1932 (p. 69), affirmed the order of the District Court. The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 61 Fed. (2d) 812. Both courts rested their decision upon a decision of the Circuit Court of Appeals for the Third Circuit in *Silberberg* v. *Ray Chain Stores, Inc.*, 54 Fed. (2d) 650, affirmed 58 Fed. (2d) 766, certiorari denied, U. S. Supreme Court Advance Opinions, No. 1, October, 1932 Term, p. 35, 53 Sup. Ct. 83, 77 L. Ed. 35; *In re*: Diamond's Estate (C. C. A. 6), 259 Fed. 70, 74; *Moore* v. *Scott* (C. C. A. Ninth), 55 Fed. (2d) 863. Application was made to this court for a certiorari in *Silberberg* v. *Ray Chain Stores, Inc.*, which was denied October 17, 1932, U. S. Supreme Court Advance Opinions, No. 1, October, 1932 Term, p. 35, 53 Sup. Ct. 83,

77 L. Ed. 35. Since the decision of the Ray Chain Stores case by the Circuit Court of Appeals for the Third Circuit, the Court of Chancery of New Jersey has denied its force and effect as controlling that court and has intimated that it would not consider itself bound by any authority of a lower rank than this court. *Isenberg* v. *Kimberly Phonograph Co.*, 111 N. J. Eq. 195 (V. C. Buchanan). The attitude of the Court of Chancery is well illustrated by this case and *Perfection Garment Co.* v. *Crosby Stores, Inc.*, 109 N. J. Eq. 450 (V. C. Fallon); *Shachat* v. *Standard Auto Supply Co.*, 106 N. J. Eq. 105 (V. C. Church); *Colton* v. *Bank Shares Corporation*, 108 N. J. Eq. 417 (V. C. Backes).

5. The writ of certiorari is applied for because of the following reasons:

(a) The Circuit Court of Appeals for the Third Circuit decided an important question arising under the Bankruptcy Act in such a manner that irreconcilable conflict has been created between the United States District Court in Bankruptcy and the Court of Chancery of New Jersey, which can only lead to unseemly disputes and cross proceedings in contempt against receivers appointed by the state courts and trustees acting under the authority of the court of bankruptcy. The New Jersey Court of Chancery has repeatedly announced that, despite the filing of a petition in bankruptcy within four months after the appointment by it of a receiver, it retains jurisdiction to settle the accounts of its receivers and to provide for the payment of their debts and their compensation. The New Jersey Court of Chancery has held that it would not direct its receivers to turn over assets to a trustee in bankruptcy until provision had been made for the liquidation of the

debts of the receivers and the payment of compensation to the receivers and counsel, and that it would consider any attempt by any official of the court of bankruptcy to interfere with it's winding up of the affairs of the receivership pending before it as a contempt of the Court of Chancery. The New Jersey Court of Chancery has repeatedly announced that in its opinion it is the duty of the trustee in bankruptcy to appear before the Court of Chancery and to petition that court to turn over the assets after the winding up of the affairs of the receivership and that, if dissatisfied with the action of the Court of Chancery, his recourse is ultimately to this Court.

The New Jersey Court of Chancery will not recognize the opinion of any Federal Court, except this Court, and the imminency of the conflict is indicated by the following letter written by the Vice Chancellor who decided the Crosby Stores matter in the New Jersey Court of Chancery after he was advised of the decision of the Circuit Court of Appeals in the Ray Chain Stores Case:

> "I write to suggest that someone in interest in the questions involved in said case should arrange to have my decision in the case of Perfection Garment Co. *v.* Crosby Stores, Inc. reviewed by the Court of Errors and Appeals of this State, and, if need be, thereafter by the United States Supreme Court. I am prompted in writing to you at this time about the matter because of another case of like kind, which is now brought to my attention—Marvel Upholstering Co. I have in mind also another case, some time ago, Regalite Corporation of America, in which Mr. Philip J. Miele was receiver and Mr. Aaron Melniker was counsel. In order to avoid further conflict between the Federal courts and the State courts, the matter should be finally

> adjudicated after the enlightenment of not only members of the bar, but members of the several courts throughout the country. The case of Perfection Garment Co. *v.* Crosby Stores, Inc., particularly because of several of the questions involved, would be an excellent case to be reviewed."

And by his opinion in *Moore* v. *Federal Metal Bed Co.*, 110 N. J. Eq., 217, at 219; and by his reference to his opinion in the Crosby Stores case, in *Umland* v. *United Public Service Co.*, 11 N. J. Eq., 563, at page 573.

The case was affirmed by the court of last resort in New Jersey, 111 N. J. Eq., 613 (Nov. 23, 1932). While the Court delivered its own opinion, it did not criticize the language of the Court below.

The trustee in bankruptcy declined to appeal the order made by the New Jersey Court of Chancery in the Crosby Stores, Inc. matter, and instead instituted the proceedings of a summary nature which resulted in the instant case in the United States District Court for the District of New Jersey.

(b) As a result of the decision by the Circuit Court of Appeals for the Third Circuit, it will be impossible, for practical purposes, for receivers appointed by State courts to do anything more with the property of a corporation than to hold it for a period of four months after the appointment, for the effect of the decision of the Circuit Court of Appeals for the Third Circuit is that an adjudication in bankruptcy, no matter how long after the filing of the petition, if the petition be filed within four months after the appointment of a receiver, is to undo and render void every act performed by the receiver after the filing of the petition. And this would be true, despite the fact that the

receiver is wholly unaware that a petition has been filed in a United States District Court, sitting in bankruptcy, somewhere in the United States. As a result of the decision of the Circuit Court of Appeals for the Third Circuit, State courts sitting in equity, would be prevented, for all practical purposes, from authorizing receivers' certificates and the incurring of debts, for it is hardly likely that a court will authorize its receivers to incur debts or issue certificates without having the power to ultimately provide for the payment of their debts. Indeed, the decision of the Circuit Court of Appeals for the Third Circuit may give rise to the claim that every act performed by the receiver, every transfer of title by him, and the like is void and of no effect, if there is ultimately an adjudication upon a petition in bankruptcy filed within four months of the appointment of the receiver.

(c) It is submitted that the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re Jack Stolkin*, 42 F. (2d) 829 (C. C. A. 2nd 1930). It is further submitted that the Circuit Court of Appeals for the Third Circuit and the District Court, as well as the Circuit Court of Appeals for the Ninth Circuit, misapprehended the effect of the decisions of this court in *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645; *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060, and *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640, 67 L. Ed. 1151, and failed to give due weight to the decisions of this Court in *In re Watts*, 190 U. S. 1, 47 L. Ed. 933, *Galbraith* v. *Vallely*, 256 U. S. 46, 65 L. Ed. 823, *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413, which line of cases the New Jersey Court of Chancery has followed.

It is submitted that the decisions of this Court were never intended to prevent a State court from winding up it's connection with a receivership and from compensating its officials, and nothing but a decision of this Court can end the unseemly conflict on that issue now current between the United States District Court for the District of New Jersey and the New Jersey Court of Chancery.

WHEREFORE your petitioners respectfully pray that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record of all proceedings of the said United States Circuit Court of Appeals for the Third Circuit, and of the District Court of the United States for the District of New Jersey, and all proceedings in both courts, to the end that the said case may be reviewed and determined by this Court, as provided by law, and that your petitioners may have such further and other relief or remedy in the premises as to this court may seem appropriate, and that the said decree of the United States Circuit Court of Appeals for the Third Circuit, affirming the decree of the United States District Court for the District of New Jersey may be set aside and that the decree of the United States District Court, for the District of New Jersey, may be set aside and the record remitted to that court with instructions to enter a decree dismissing the proceedings, and your petitioners will ever pray.

MERRITT LANE,
Attorney for and of Counsel with
Petitioners.

BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

I.

The memorandum of the United States District Court is found on page 43 of the record and is not reported. The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 61 Fed. (2d) 812 and is printed on page 65. The opinion of the District Court in the Ray Chain Stores case is reported in 54 Fed. (2d) 650. The opinion of the Circuit Court of Appeals for the Third Circuit in the same case is reported in 58 Fed. (2d) 766. The denial of the writ of certiorari by this court in the same case is reported 77 L. Ed. 35, U. S. Supreme Court Advance Opinions No. 1, October 1932 Term, page 35; 53 Sup. Ct. 83.

II.

Jurisdiction.

The jurisdiction of this court is rested on section 240 of the Judiciary Code as amended by the act of February 13, 1925, sec. 1, 43 Statutes 938, sec. 347, Title 28, U. S. C. A. 359. The date of the decree of the United States Circuit Court of Appeals for the Third Circuit to be reviewed is November 17, 1932.

III.

The grounds upon which the jurisdiction of this court is invoked are fully set forth in paragraph 5 of the petition, page 7.

IV.

Statement of the Case.

The case is fully stated in the petition, paragraphs 1 to 4, pages 2 to 6.

V.

Specifications of Error.

1. The United States Circuit Court of Appeals erred in holding that it had jurisdiction in bankruptcy in a summary proceedings to direct the receivers in Chancery, counsel for the receivers and counsel for the complainant to turn over to the trustees of the bankrupt estate fees which had been allowed to them for compensation for services rendered in the proceedings in the Court of Chancery which had resulted in the appointment of receivers under the statute of New Jersey.

2. The United States Circuit Court of Appeals erred in not holding that the Court of Chancery, which had originally acquired jurisdiction, was competent to hear and determine all questions with respect to the administration of the estate while in the control of the Court of Chancery, through its receivers, and to wind up their accounts, to fix their fees and the fees of their counsel and the solicitor of the complainant, and erred in holding that the mere filing of the petition in bankruptcy superseded all jurisdiction of the Court of Chancery.

Argument.

1. The decision below is in conflict with the established State law and the decisions of this court and also the Federal courts.

2. The decision below unduly interferes with the right of the State court to wind up the affairs of estates which have come to its possession so that its receivers and their counsel may be compensated and what remains turned over to the trustee in bankruptcy.

3. The decision below destroys the independence of the State courts in violation of State rights.

4. The decision below was erroneous in that it held that the District Court might proceed in a summary proceeding in bankruptcy against the receivers, receivers' counsel and the solicitors of the complainant in the State court, they being adverse claimants.

The District Court concluded, and its conclusion was sustained by the Circuit Court of Appeals, that as soon as the adjudication in bankruptcy title to the bankrupt's estate vested in the trustee as of the date of the filing of the petition and the jurisdiction of the Court of Chancery of New Jersey was superseded as of the date of filing the petition, and that court had no power to wind up the affairs of the estate which had come to it at a time when it had complete jurisdiction, compensate its receivers and their counsel and the solicitor of the complainant and direct the receivers to turn over what might remain to the trustee in bankruptcy. It further held that the District Court had power to proceed

against the receivers, receivers' counsel and solicitors for the complainant in a summary proceeding in bankruptcy notwithstanding the fact that they were adverse claimants of the funds in their possession which had been paid to them by order of the State court and notwithstanding the fact that the offices of the State court had what were in the nature of liens upon the assets of the trust estate in their charge. *Seidler* v. *Branford Restaurant*, 97 N. J. Eq. 153, affd. 97 N. J. Eq. 531; *Jeffers* v. *N. J. and P. R. Co.*, 86 N. J. Eq. 68; *Chesapeake & Ohio R. R. Co.* v. *Atlantic Transportation Co.*, 62 N. J. Eq. 751; *Petersburg Sav. Ins. Co.* v. *Dellatorre*, 70 Fed. 643 (C. C. A. 5th).

While it is true that an adjudication in bankruptcy places the bankrupt's assets in *custodia legis* for certain purposes as of the date of the filing of the petition, it does not follow that the prior actual possession and jurisdiction of a State court is suspended for all purposes. The orderly conduct of administration between successive jurisdictions requires at least that the court having prior jurisdiction be permitted to wind up the proceedings before it, to compensate its officers, and to discharge their obligations.

A contrary view will result in chaos. A receiver appointed by a State court may, under direction of the court, carry on the corporate business, sell property, personal and real, incur obligations upon receiver's certificates, and incur other debts. A petition in bankruptcy may have been filed shortly before the lapse of the four-month period and adjudication may follow some time later. Under the decision of the lower courts, it is entirely clear I submit that every act of the receiver after the filing of the petition is utterly void, and this despite the fact that the receiver was unaware of the filing of the petition. And since it is

unlikely that any court will authorize its receiver to issue certificates, incur debts, or proceed with the administration of the receivership estate without having the power to ultimately provide for the payment of the receiver's certificates and debts and to compensate the receiver and his counsel, the practical effect of the lower courts' decision is to, in a large part, emasculate equity or statutory receiverships, in State Courts.

Moreover the Chancery Receivers upon their appointment gave bond conditioned that they would account in Chancery. How under the circumstances can they comply with the condition of their bond?

The opinion of the District Court in the Ray Chain Stores Case, 54 Fed. (2nd) 650, affirmed 58 Fed. (2nd) 766, certiorari denied, 77 L. Ed. 35, U. S. Supreme Court Advance Opinions, No. 1, October, 1932 Term, p. 35, 53 Sup. Ct. 83, upon which the decision below rests intimates that even the acts performed by the receiver prior to the filing of a petition within four months of his appointment are at least reviewable by the bankruptcy court, because the appointment of a receiver itself is an act of bankruptcy and void as against the trustee. Needless to say, the adoption of such a view would immediately result in the elimination of all equity or state statutory receiverships.

In order to preserve their receivership jurisdiction and insure the orderly administration between successive courts, the State courts have reached a conclusion contrary to that reached by the court below. *Mauran* v. *Crown Carpet Lining Co.*, 23 R. I. 344, 50 Atl. 387 (1901); *Shannon* v. *Shepard Mfg. Co.*, 42 A. B. R. 12, 230 Mass. 224, 119 N. E. 768 (1918); *Perfection Garment Co.* v. *Crosby Stores, Inc.*, 109 N. J. Eq. 450 (Ch. 1932); *Shachat* v. *Standard Auto Sup-*

ply Co., 106 N. J. Eq. 105 (Ch. 1930); *Colton* v. *Bank Shares Corporation of the United States*, 108 N. J. Eq. 417 (Ch. 1931); *Kennedy* v. *American Tanning Co.*, 81 N. J. Eq. 109-111 (Ch. 1913); *Cudahy Packing Co.* v. *New Jersey Dairy Products Co.*, 90 N. J. Eq. 541 (Ch. 1919).

In *Colton* v. *Bank Shares Corporation*, 108 N. J. Eq. 417, Vice Chancellor Backes ably expressed the position of the State court:

> "On May 2d, 1930, Samuel I. Kessler was appointed receiver of the defendant company. On June 6th, on its own petition the company was adjudged a bankrupt by the federal court in New York and on August 14th the Irving Trust Company was appointed trustee. The receiver has filed his account, asks its approval, the fixing of his compensation and that of his counsel and direction to pay the residue to the trustee. On June 15th, 1931, the federal court (a referee) ordered the receiver individually to file his account in that court together with a verified statement of his services and expenses as receiver to the date of the adjudication and that he forthwith turn over the estate in his hands to the trustee. New York counsel of the trustee, who was also the attorney of the petitioner in bankruptcy, appeared on this motion, *pro hac vice*, and, presuming to appear specially objected to the court making allowances, claiming that the jurisdiction resides in the federal court. A compliance with the order of the federal court by our receiver without the consent of this court would be contempt of this court. A more orderly and courteous procedure would have been to have applied to this court for directions to its receiver; and, according to the authorities, that is the exclusive course. The course adopted by counsel for the trustee is unwarranted and his statement in court that

a non-compliance with the order of the referee might result in our receiver landing in jail is offensive. The federal court may well be depended upon to restrain such threatened abuse of power. The practice as laid down in Shachat *v.* Standard Auto Supply Co., 106 N. J. Eq. 105, is that indicated *In re* Watts & Sachs, 190 U. S. 1, which has ever since been the guide of courts and lawyers in this state, that the court of primary jurisdiction may supervise the administration of its receivers and fix their compensation, and it will be adhered to. The recent case of Isaacs *v.* Hobbs Tie & Timber Co., 282 U. S. 734, cited by the trustee, does not touch that question. That was a foreclosure of mortgage suit brought after a trustee was appointed and the court held it to be not maintainable; that as the mortgaged property was in the hands of the bankruptcy court, the right to a lien and its enforcement could only be handled in that court. The opinion deals with the title to bankrupt's property and not with the orderly judicial administration of bankrupt's assets, and restates the familiar rule that obtains in all courts of equity and upholds the authority of this court as the court of original jurisdiction to dispose of property in its custody according to law: '* * * when a court of competent jurisdiction takes possession of property through its officers this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property.' This is a plain recognition of the power of this court to control the disposition of property in *custodia legis* and that right must be accorded by the bankruptcy court until this court has set its house in order. The principles of comity in

> judicial conduct are informatively discussed by Mr. Justice Moody in Wabash Railroad Co. *v.* Adelbert College, 208 U. S. 38. The duty of this court under our corporation act was to administer the estate while in its possession and its duty now is to pass the assets over to the federal court, whose jurisdiction has superseded ours under the Bankruptcy Act, after liquidating the expense attending its administration in this court. This makes for convenient and orderly conduct of administration between successive jurisdictions, and is supported by the weight of authority and has been followed by both state and federal courts as the appropriate course since *In re* Watts & Sachs."

In *Kennedy* v. *American Tanning Co.*, 81 N. J. Eq. 109, Vice Chancellor Garrison said:

> "Without going deeply into the matter, I cannot conceive it possible that the bankruptcy court would contend that it was entitled to take over the property which has been in *custodia legis* in this court until this court should have reimbursed those who had, under its direction or with its sanction expended moneys for the preservation of the property in question. Very different questions arise where moneys are to be paid out for any other purposes, and I shall not herein discuss those other questions."

This Court and lower Federal courts have on many occasions recognized the propriety of the view of the State courts in decisions which, it is submitted, are in conflict to the decision of the court below in the case at bar. In *In re* Watts, 190 U. S. 1, 35, 47 L. Ed. 933, 944 (1902), Chief Justice Fuller, speaking of this Court, said:

> "It has been already assumed that the bankruptcy proceedings operated to suspend the further

> administration of the insolvent's estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way."

See also *Carling* v. *Seymour Lumber Co.*, 113 Fed. 483, 491 (C. C. A. 5th, 1902), certiorari denied 186 U. S. 484, 46 L. Ed. 1261 (1902); *In re Dayton Coal & Iron Co.*, 291 Fed. 390 (Tenn., 1922); *In re Jack Stolkin*, 42 F. (2d) 829 (C. C. A. 2d, 1930); *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413 (1902); *Galbraith* v. *Vallely*, 256 U. S. 46, 65 L. Ed. 823 (1921); *Acme Harvester Co.* v. *Beckman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208 (1911).

In *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413 (1902), the bankruptcy court ordered Comingor, an assignee who had been acting under a State statute and who had filed his accounts in the State court, to turn over to the trustee in bankruptcy sums retained by him as compensation for his counsel and himself. This order was reversed on appeal. Referring to the dispute as to the fixing of compensation for the assignee and his counsel, this court said:

> "If the jurisdiction of the district court was not consented to, then the state court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there."

In the recent case of *In Re Jack Stolkin*, 42 F. (2d) 829 (1930), the Circuit Court of Appeals for the Second Circuit reviewed the pertinent opinions of this Court and expressly approved the doctrine of the Comingor case. If an assignee

for the benefit of creditors is entitled to have his allowances determined by the State court despite supervening bankruptcy, then *a fortiori* a receiver appointed by a State court is entitled to have the allowances to his counsel and himself fixed by the court which appointed him.

The District Court in the Ray Chain Store case and the court in *Moore* v. *Scott*, 55 F. (2d) 863 (C. C. A. 9th, 1932), upon which the Circuit Court of Appeals below rested its opinion in the Ray Chain Store case, based their conclusion upon *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645 (1931); *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060 (1931); *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640, 642, 67 L. Ed. 1151 (1923). These decisions, I submit, are controlling. The Isaacs case, as stated by Mr. Justice Roberts, involved solely the following question:

> "After the bankruptcy court has acquired jurisdiction of the estate of the bankrupt and the referee therein has entered an order requiring sale, by the trustee, of all of the property of the bankrupt but before the trustee has taken any steps to sell land (part of such estate) entirely located in another judicial district, can a suit to foreclose a valid mortgage thereon be commenced and an order of sale thereunder be made over the objection of the trustee, by the court of the latter district?"

Clearly the answer must be in the negative, and this Court so held. This Court had no occasion to consider and did not consider, whether, upon supervening bankruptcy, a State court may put its house in order by fixing the allowance of its receiver and his counsel and by settling his accounts. Similarly, the Straton and Lion Bonding cases did not involve the situation here presented and accordingly are not controlling.

The District Court in the Ray Chain Store case placed considerable reliance upon Mr. Justice Roberts' language in the Straton case to the effect that upon the filing of a petition in bankruptcy, followed by an adjudication, the jurisdiction of the bankruptcy court is exclusive from the date of the filing of the petition. In *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208 (1911) this Court, speaking through Mr. Justice Day, used similar language, but nevertheless held that an attachment suit filed in a State court after the petition in bankruptcy had been filed could be proceeded with where the bankruptcy court had not moved in the bankruptcy suit for upwards of five years. In the course of its opinion this Court said:

> "The case presented therefore shows that the bankruptcy court, upon the filing of the petition in bankruptcy, found an outstanding creditors' agreement under which it was proposed to administer and distribute the estate. It declined to appoint a receiver; it recognized the propriety of the proceedings of the creditors' committee; it received reports of the creditors' committee, and allowed it for years to go on in the operation of the property, to mature a plan for the settlement of the debts outside of the court, and not contemplated in the bankruptcy act. The creditors in large numbers signified a purpose to take stock in a reorganization and for more than five years after the time of the filing of the petition, it was found by the Supreme Court of Missouri, had made no attempt to adjudicate the corporation a bankrupt, or proceed to the settlement of the estate under the requirements of the act."

The court further said:

> "It is suggested that even now the bankruptcy court may proceed to an adjudication, but this sug-

> gestion is at war with all that has been done with the knowledge and sanction of the district court. As we have seen, the property to be administered in the bankruptcy court is that which belonged to the bankrupt at the filing of the petition, and then subject to his debts. This property can never be recovered. With the sanction of the district court much of it has been sold, its character has been changed, and it has been dealt with by the creditors' committee regardless of the provisions of the bankruptcy law. Many of the creditors have signified their purpose to adjust their claims by taking stock in a reorganization, or 50 cents on the dollar, of the amount of their claims. The whole proceedings makes it clear that the district court denied the adjudication and declined to exercise its jurisdiction as a bankruptcy court."

It is clear, I submit, from the opinion of this Court in the Acme Harvester case, that a State court is not divested of jurisdiction for all purposes after filing of a petition in bankruptcy. If it were then it would be wholly immaterial whether the bankruptcy court remained inactive for a long period of time for the mere pendency of the bankruptcy proceeding would deprive other courts of jurisdiction. At least the petition in bankruptcy would have to be dismissed before any act of another court could have any validity. The petition in the Acme Harvester case was still pending, however, at the time the State court proceeded. Similarly, if the theory of the lower court's decisions is correct then there would be no justification for the decision in *In re Oakland Lumber Co.*, 174 Fed. 634 (C. C. A. 2d, 1909), and like decisions refusing to appoint a receiver in bankruptcy upon the filing of a petition on the ground that the property was in the hands of an assignee or receiver

under State law. The refusal of the court of bankruptcy to appoint a receiver would leave the property under the control of a person whose acts would be void.

The decision of the lower courts in the instant case is not supported by any express language in the Bankruptcy Act and is in disregard of the principles underlying the decisions dealing with conflicts of jurisdiction between successive courts. Cf. *Harkin* v. *Brundage*, 276 U. S. 36, 72 L. Ed. 457 (1928); *Wabash R. R.* v. *Adelbert College*, 208 U. S. 38, 54, 52 L. Ed. 379 (1908); *Murphy* v. *John Hoffman Co.*, 211 U. S. 562, 568, 53 L. Ed. 327 (1909). In *In Re Watts, supra*, Chief Justice Fuller said:

> "The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit; but that rule can have only a qualified application where winding-up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity, and accordingly the receiver of the district court brought his appointment to the knowledge of the Floyd circuit court and requested the delivery of the assets."

The decision of the lower court not only is in disregard of that comity referred to by Chief Justice Fuller, which is so essential to our system of dual sovereignty, but is in conflict with established rules of law as set forth by this Court, inferior Federal courts and State courts. Due regard for the orderly administration of insolvent corporate affairs and due regard for the jurisdiction of State courts requires that the court having prior actual possession be

at least permitted to compensate its receiver and his counsel and settle its receiver's accounts before turning the assets over to a court of bankruptcy. There is nothing in the bankruptcy act which compels a contrary conclusion. Indeed, it may be questioned whether Congress could constitutionally enact that a bankruptcy court has the right to in effect, by force, take away property from a State court which has appointed a receiver who has taken possession, acquired title under State law and administered the corporate affairs without permitting the state court to compensate its receiver and his counsel and settle its receiver's accounts.

In a recent note in 41 *Yale Law Journal*, 1234 (1932), the author discusses the Ray Chain Store case and the conflict between the New Jersey Court of Chancery and the Federal Courts.

That conflict is so well expressed by Vice Chancellor Buchanan in *Isenberg* v. *Kimberley Phonograph Co. of N. J.*, 111 N. J. E. 195, as that I quote from it:

> "The trustees in bankruptcy appear, by their solicitors, and object not only to the making of the order for allowances in the amount and in the form asked by the receiver, but to the making of any allowances whatever by this court; their contention being that this court is without power to make such allowances—under the authority of Isaacs *v.* Hobbs Tie & Timber Co., 282 U. S. 734; Silberberg *v.* Ray Chain Stores Co. Inc., 54 Fed. Rep. (2d) 650; affirmed 58 Fed. Rep. (2d) 766; Moore *v.* Scott, 55 Fed. Rep. (2d) 863; Lion Bonding Co. *v.* Karatz, 262 U. S. 640, and Bloch *v.* Bloch, 86 N. Y. Supp. 1047.
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> The proposition that this court, after an adjudication of bankruptcy, is without jurisdiction or

> power to fix the compensation of its receiver duly appointed on adjudication of insolvency prior to any bankruptcy proceedings, is one in which this court cannot concur and to which it cannot yield unless upon explicit and controlling authority. In the view of this court, the federal legislation does not purport, expressly or impliedly, to effect any such result; and even if it did, the constitutional validity of such an attempt would be, to say the least, open to serious question."

In the case at bar the bankruptcy receiver permitted the receivers of the State court to proceed to operate the business of the defendant corporation, sell and purchase merchandise and incur obligations. The receiver of the bankruptcy court stood by and permitted the receivers of the State court and the State court to involve themselves.

It is impossible to determine how much of the moneys in the hands of the receivers in Chancery was derived from the sale of inventory which came to their possession at the time of their appointment and how much was derived from the sale of merchandise which they purchased. Certainly the trustee in bankruptcy is not entitled to the proceeds of the sale of merchandise which the receivers of the State Court purchased, those receivers being an entity, created by the statute of New Jersey, separate and apart from the corporation and holding title for the benefit of the creditors and stockholders of the corporation and adverse to the corporation as such. By the conduct of the receiver and trustee in bankruptcy in standing aside, they at least placed the receivers in Chancery in no worse position than had they been ancillary receivers.

In *Loeser* v. *Dallas*, 192 Fed. 909, the Circuit Court of Appeals, 3rd Circuit, speaking by Judge Buffington, said:

"The amendment of June 25, 1910, to the bankrupt law, providing for ancillary proceedings in bankruptcy, simply recognized by statute a practice which courts of bankruptcy, in pursuance of principles of equity and comity, had theretofore generally exercised. In the nature of this an ancillary receiver must be subject alone to, and obey the orders of, that court of which he is an officer. So obeying, it follows that to it alone must he account. Any other course would breed confusion in administration and go far toward making the exercise of ancillary jurisdiction impracticable; for if a court, in pursuance of comity, undertakes to exercise ancillary jurisdiction by administering local assets, which it alone has power and jurisdiction to administer, it follows that its hand must be free to administer by its own officer and to exact from him the full measure of duty. Such executive work it can only secure from an officer answerable to it alone. Kirker *v.* Gwings, 98 Fed. 511, 39 C. C. A. 132; Sands *v.* Neely, 88 Fed. 133, 31 C. C. A. 424; In re Isaacson, 174 Fed. 406, 98 C. C. A. 614; Ames *v.* U. P. Ry. Co. (C. C.), 60 Fed. 966.

"These recognized principles and practices in ancillary proceedings we must assume Congress had in view in passing the amendment in question. When in such cases the receiver of an ancillary court makes his accounting to his own court, that court meets all requirements of comity to the primary court by affording the latter, through its proper officer, the opportunity to question the correctness of the accounting to the ancillary court. That was done in this case, and the contention that each creditor in the court of primary jurisdiction had to have notice, and, because the ancillary court had in its possession no list or knowledge of who such creditors are, that therefore the ancillary receiver must file his

account in the primary court, is a non sequitur, based on the assumption that Congress, while authorizing ancillary proceedings, coupled therewith an extra territorial accounting to which no court should subject its own receiver. As this petition has subjected the ancillary receiver to the expense of contesting the petition in this court, the court below is authorized to make such proper reimbursing allowance for such expense to its receiver from the fund in his hands as it deems proper.

"The order of the District Court is affirmed, with costs, and the record will be remanded, with instruction to that court to allow said costs, and a reasonable counsel fee to the ancillary receiver's counsel for his services in this court, to be paid out of the balance of moneys appearing by his report to be in the hands of said receiver."

Judge Buffington states that the amendment providing for ancillary proceedings simply recognized by statute a practice which courts of bankruptcy have followed in pursuance of principles of equity and comity. He held that an ancillary receiver can be subject only to the order of the Court which appointed him. The analogy between the Chancery receivers in the case at bar and ancillary receivers is apparent.

The Ray Chain Store case is not applicable as to its facts to the case at bar. In that case ancillary receivers in bankruptcy were appointed, while in this case no ancillary receivers were appointed and the Chancery receivers either had to continue to act substantially as ancillary receivers or abandon the property.

I respectfully submit that the decisions of the Circuit Court of Appeals for the Third Circuit are in conflict with

the decision of the Circuit Court of Appeals for the Fifth Circuit, *Loveless* v. *Southern Grocer Co.*, 159 Fed. 415; *In re Conservative Mortgage and Guaranty Company*, Circuit Court of Appeals for the Sixth Circuit, 24 Fed. Rep. (2nd) 38, as well as *In re Jack Stolkin*, Circuit Court of Appeals for the 2nd Circuit, 42 Fed. (2d) 829.

I further submit that the decision of the Circuit Court of Appeals to the effect that the proceedings against the receiver, his counsel and the counsel for the complainant should be of a summary nature is in conflict with the opinions of this court in *re Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413; *Galbraith* v. *Vallely*, 256 U. S. 46, 65 L. Ed. 823; *In re Jack Stolkin* (C. C. A. 2, 42 Fed. (2) 829). The District Court in the Ray Chain Store case, 54 Fed. (2d) 650, seemed to think that the proceedings would have to be of a plenary nature, but the Circuit Court of Appeals in the instant case has distinctly held that the proceedings could be of the summary nature indulged in in the case at bar, p. 67.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that a writ of certiorari should be granted.

Respectfully submitted,

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with Petitioners.